

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

LAMAR BROWN,

Plaintiff,

v.

PRO-SOURCE PERFORMANCE
PRODUCTS, INC.,
Defendant.

Civil Action No. 1:22-cv-06086

**DEFENDANT PRO-SOURCE PERFORMANCE PRODUCTS, INC.’S RESPONSE IN
OPPOSITION TO MOTION TO STRIKE DECLARATION AND VIDEO OF ROBERT
KINGETT**

Defendant, Pro-Source Performance Products, Inc. (“Pro-Source”), through its counsel, O’Hagan Meyer, LLC, hereby submits this Response in Opposition to Motion To Strike Declaration and Video of Robert Kingett.

Defendant filed a letter Motion requesting leave to file video evidence and outlined exactly what type of video evidence would be submitted on August 29, 2022 (ECF #9). Plaintiff failed to file any response in opposition to that request and now brings this Motion.

Nevertheless, Plaintiff’s argument that the Declaration should be stricken lacks merit. The Declaration of Robert Kingett (Ex. C to Memorandum in Support of Motion to Dismiss) is filed in conjunction with a video of Mr. Kingett reviewing the website with his screen reader. “A defendant is permitted to make a fact-based Rule 12(b)(1) motion, proffering evidence beyond the complaint and its exhibits.” *MMA Consultants 1, Inc. v. Rep. of Peru*, 719 F. App’x 47, 49 (2d Cir. 2017) (summary order) (defining fact-based Rule 12(b)(1) motion as one where “the defendant puts forward evidence to challenge the factual contentions underlying the plaintiff’s assertion of subject-matter jurisdiction”).

The video overall is not hearsay. While commentary in the video could be considered hearsay, the video is of Robert Kingett using his fingers and screen reader to go through the website and show that the website is usable to visually impaired individuals and is not hearsay. Having his screen reader read out the website is not an “out of court” statement taken for the truth of the matter asserted.

Plaintiff does not argue that Mr. Kingett did not properly use the screen reader and no response from Plaintiff in his Declaration he filed contradicts anything in the video. Mr. Kingett is a totally blind individual that knows how to use a screen reader and used it on the website at issue in the case. (Ex. C to Memorandum in Support of Motion to Dismiss, Ex. C, ¶¶5-9, see also August 31, 2022 review attached as Ex. 1 to Ex. C).

Mr. Kingett’s Declaration further is not conclusory, nor does he fail to establish that he has personal knowledge. It is very simple, he is totally blind and knows how to use a screen reader and did so on the website. The Court can see with its own eyes that Mr. Kingett went through the website and his statement that he did not have “any issues on the website” is not conclusory and supported through merely watching him use a screen reader on the Website.

WHEREFORE, the Defendant, Pro-Source Performance Products, Inc., respectfully requests that this Court enter an Order denying Plaintiff’s Motion to Strike the Declaration of Robert Kingett.

Respectfully submitted,

/s/ Ryan T. Benson
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 7, 2022, all counsel of record who are deemed to have consented to electronic service are being served a true and correct copy of the foregoing document using the Court's CM/ECF system:

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